No. 05-1074

FILED
JUN 5 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Lilly M. Ledbetter,

Petitioner,

v.

Goodyear Tire and Rubber Company, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert L. Wiggins, Jr.
Jon C. Goldfarb
WIGGINS, CHILDS, QUINN
& PANTAZIS
The Kress Building
301 Nineteenth St. North
Birmingham, AL 35203

Kevin K. Russell
(Counsel of Record)
Amy Howe
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

June 5, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONERS 1
CONCLUSION 10

TABLE OF AUTHORITIES

Federal Cases

Albritton v. *Postmaster General*, No. 01A44063, 2004 WL 2983682 (EEOC Office of Fed. Op., Dec. 17, 2004) 8, 9

Amft v. *Mineta*, No. 07A40116, 2006 WL 985183 (EEOC Office of Fed. Opp., Apr. 6, 2006) 9

Ash v. *Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006) 10

Ashley v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164 (CA8 1995) 4

Bazemore v. *Friday*, 478 U.S. 385 (1986) 3, 6, 7, 8

Brinkley-Obu v. *Hughes Training, Inc.*, 36 F.3d 336 (CA4 1994) 4

Calloway v. *Partners National Health Plans*, 986 F.2d 446 (CA11 1993) 7

Elmenayer v. *ABF Freight System, Inc.*, 318 F.3d 130 (CA2 2003) 5

Forsyth v. *Federation Employment & Guidance Service*, 409 F.3d 565 (CA2 2005) ..... passim

Goodwin v. *Gen. Motors Corp.*, 275 F.3d 1005 (CA10 2002) 4

Hall v. *Ledex, Inc.*, 669 F.2d 397 (CA6 1982) 4

National Railroad Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002) ..... passim

Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 10

Shea v. *Rice*, 409 F.3d 448 (CADC 2005) ..... passim

Wedow v. *City of Kansas City*, 442 F.3d 661 (2006) 8

Zuurbier v. *Medstar Health, Inc.*, 895 A.2d 905 (2006) 8

Other Authorities

EEOC COMPLIANCE MANUAL § 2-IV.C 8

REPLY BRIEF FOR THE PETITIONERS

It is common ground among the parties and the courts of appeals that the limitations period for filing a Title VII claim begins to run anew for each discrete "unlawful employment practice." Pet. 12-13; BIO 1; *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."). There is substantial dispute, however, over whether in a disparate pay case the unlawful employment practice occurs at the time an employer makes a decision setting the employee's pay rate or whether it is instead the actual payment of a discriminatory wage that violates Title VII and, hence, begins the limitations period anew with each unlawful paycheck. Compare, *e.g.*, Pet. App. 23a (holding that "the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid") with *Forsyth* v. *Federation Employment & Guidance Service*, 409 F.3d 565, 573 (CA2 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea* v. *Rice*, 409 F.3d 448, 452 (CADC 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason."). Respondent does not contest that this question is of considerable importance to employers and employees alike, a fact confirmed by the EEOC in its brief to the Eleventh Circuit in this case. EEOC Br. 1 (noting importance of issue); see also Pet. 16-17 (EEOC receives thousands of disparate pay claims each year). Instead, respondent attempts to obscure the fundamental disagreement among the courts, proposing various distinctions among the cases that were immaterial to the courts themselves and plainly irrelevant as a matter of law.

1. Respondent does not dispute that the Eleventh Circuit held below that the relevant unlawful employment practice in

a disparate pay case is the decision setting the pay rate, rather than the issuance of the paycheck. See Pet. App. 23a. Nor does respondent contest – indeed, it insists – that if this is correct, it directly follows under *Morgan* that a plaintiff may not bring a disparate pay claim if the pay-setting decision was made outside the limitations period. See BIO 14-15. As discussed in the petition and *infra*, that conclusion is directly contrary to the decisions of several other circuits.

Respondent nonetheless argues that the decision below is not worthy of this Court's consideration because the court of appeals limited its holding to a "narrow" subset of disparate pay cases, namely cases in which the employer periodically reviews and "re-establishes" employee pay. BIO 6. This argument is entirely unconvincing. It is true that the court of appeals pointed to Goodyear's system of annual pay raise reviews as a ground for distinguishing prior circuit precedent (while also suggesting that the precedent was wrongly decided). See Pet. App. 26a-27a. But it is equally true that this purportedly "narrow" holding governs a substantial portion of disparate pay claims in the Eleventh Circuit. Importantly, the court made perfectly clear that all that is required to invoke its holding is that the employees have "regular opportunities to complain of improperly deflated pay and to seek a raise." Pet. App. 26a. Thus, although the court used the phrase "re-assessment" at times, it plainly did not mean either to restrict its holding to cases in which an employer conducts a *de novo* assessment of the worker's proper wage, or to exclude cases in which supervisors only have authority to provide a modest increase to the worker's pre-existing salary.[1] Respondent does not contest that a

---

[1] It is undisputed that in this case, as in most, the employer took a worker's prior salary as a given and decided simply whether to give that worker a marginal raise. See, *e.g.*, BIO 2; Pet. 4 & n.5. It was also uncontroverted at trial that Goodyear strictly limited supervisors' authority to grant raises, establishing general caps of

substantial portion of the workforce has its pay subject to such "periodic reassessments" and therefore will be subject to the rule announced in this case.[2]

Respondent also suggests that this Court's review should be delayed because other circuits might change their view in light of the Eleventh Circuit's decision in this case. But that assertion is entirely implausible, as the existence of a system of annual pay raise reviews has no relevance under the rationales adopted by those courts, see *infra*, and has no conceivable relevance to the question under *Morgan*, namely whether tendering a discriminatory paycheck constitutes an "unlawful employment practice" under Title VII. Indeed, respondent itself never argued for such a distinction before the panel, see C.A. Br. 22-32, and makes no defense of that distinction now, see BIO 13-19. Moreover, *Bazemore* v. *Friday*, 478 U.S. 385 (1986), itself – which *Morgan* reaffirmed – involved a system of periodic review indistinguishable from Goodyear's. Pet. 23-25; EEOC Br. 10. The Eleventh Circuit's holding should not evade review simply because it is so untenable that no other court has had occasion to reject it.

2. As demonstrated in the petition (Pet. 9-15) numerous circuits hold that because the issuance of a discriminatory paycheck constitutes an "unlawful employment practice" under Title VII, each paycheck begins a new limitations period in which the employee can challenge the discrimination, even if the decision to engage in that discrimination was made outside the limitations period. See, *e.g.*, *Forsyth*, 409 F.3d at 573 (CA2); *Shea*, 409 F.3d at 452

5% with the possibility of an additional 5% "Top Performed Award." See Pl. Ex. 17 at 3, 5; contra BIO 7 n.3.

[2] The court purported to leave open whether an employee could base a claim on the most recent pay decision occurring before the commencement of the limitations period, Pet. App. 14a, but that reservation was made to preserve the court's ability to *expand* the scope of its restrictive rule, not to narrow it. Contra BIO 7.

(CADC); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1008-10 (CA10 2002); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (CA8 1995) (en banc); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 348 (CA4 1994); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982). Respondent's limited attempt to reconcile the decision below with the law of these circuits is entirely unsuccessful.

Second Circuit. Respondent attempts to distinguish the law of the Second Circuit by asserting that *Forsyth* involved a "facially discriminatory pay structure," BIO 9, while petitioner challenged only "isolated pay decisions" made under a "facially neutral compensation program," *id.* 12. Just why this is so, respondent fails to explain. The claims in both cases are entirely indistinguishable. In each, the employer hired workers at a starting wage, subject to periodic evaluation for possible pay raises. See 409 F.3d at 567-68. Forsyth did not claim that there was anything "facially discriminatory" about such a system. Certainly, his employer did not have a written policy calling for disparate pay based on race. Instead, Forsyth, like petitioner, alleged that his employer made a series of discriminatory pay decisions under a pay system that did not overtly discriminate. See 409 F.3d at 567 (plaintiff alleged that his "employer discriminated against him * * * when making salary increase * * * decisions" and that others "were given more frequent wage increases or higher entry salaries").

Respondent latches on to the Second Circuit's description of Forsyth's claim as challenging a "discriminatory pay scale," BIO 10, perhaps hoping to give the impression that Forsyth was challenging some aspect of the employer's broader salary practices or policies. But that the phrase simply referred to the plaintiff's particular salary level, a pay scale that was no less the result of "isolated pay decisions" than was petitioner's. See 409 F.3d at 567-68, 573.

Respondent also appears to argue that Forsyth's claims were somehow structural because, it says, his claims arose

solely from the initial setting of his wage. BIO 10. But that claim is false, inexplicable, and, in any event, manifestly irrelevant to the Second Circuit's analysis. The claim is false because Forsyth plainly alleged that the disparity arose both from the initial starting wage and subsequent raise decisions. 409 F.3d at 567.[3] The assertion is inexplicable because respondent has not even suggested why discrimination in setting an individual's starting wage would render a pay structure "facially discriminatory" while the same discrimination in denying a subsequent raise would be an "isolated pay decision[]." And the asserted distinction is plainly irrelevant to the Second Circuit's holding, which turned on the timing of the paychecks rather than the timing of the discrimination. See *id.* at 573 (plaintiffs can sue "if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period"). That is, the Second Circuit recognized that under *Morgan*, the dispositive question was "when the unlawful practice occurs," *id.* at 572, and held that the "wrong actionable under Title VII" occurs with "each week's paycheck," rather than with each decision setting a starting salary or denying a raise. *Ibid.* See also *Elmenayer* v. *ABF Freight System, Inc.*, 318 F.3d 130, 134 (CA2 2003) ("[A]n employer performs a separate employment practice each time it takes an adverse action against an employee, even if that action is simply a periodic implementation of an adverse decision previously made."). Accordingly, "*[a]ny* paycheck given within the state of limitations period therefore would be actionable." *Forsyth*, 409 F.3d at 573 (emphasis added). The Eleventh Circuit

---

[3] In its discussion of the facts, the Second Circuit observed in passing that the difference between Forsyth's wage and that of two of the three proposed comparators "*appeared to be* in the starting salary" alone, *id.* at 567-68 (emphasis added), but reached no firm conclusion on the question, did not discuss the third comparator, and never mentioned the issue again.

directly rejected that conclusion in this case, creating an undeniable conflict with the Second Circuit.

D.C. Circuit. Respondent's attempted distinction of D.C. Circuit precedent relies on a similar mischaracterization of that court's holding. Contrary to respondent's assertions, the court's decision in *Shea* did not turn on the fact that the pay disparity arose because of a general policy (BIO 11) but rather on the fact that the pay decision continued to be implemented with each pay check. See, *e.g.*, 409 F.3d at 454 (Shea's claim was timely because defendant "discriminated against him within the limitations period (and thereafter) by issuing him discriminatory payroll checks"). Thus, respondent's quotation of the opinion (BIO 11) is incomplete and misleading. To be sure, the court stated that Shea's suit would be time-barred if he "were complaining of the assignment of a discriminatorily pay grade only." BIO 11 (quoting 409 F.3d at 451). But the court then went on to explain:

> Shea's complaint, however, is not simply that the State Department discriminated against him in assigning him to a lower pay grade than similarly-situated minority hires in 1992 but that, as a consequence of the "racially discriminatory" diversity program it then operated, he "*receives less pay with each paycheck than [he] would be [receiving] if [he] had not been discriminated[] against.* We believe that this allegation is properly analyzed * * * under the holding in [*Bazemore*].

409 F.3d at 452 (emphasis in original). As the court's choice of emphasis reflects, the critical point was not that Shea's pay was reduced because of a policy or "structure," but rather that the policy resulted in "a separate unlawful employment practice each time [the employer] paid one employee less than another for a discriminatory reason," *id.* at 452 (citing *Bazemore*, 478 U.S. at 396). Indeed, the court made clear that had the discriminatory policy affected only Shea's initial

salary grade assignment, but not his present pay, his claim would have been time-barred despite the fact that the assignment was the result of a "two-tier wage structure" (BIO 10) implementing a department policy. *Id.* at 451.

Even under respondent's interpretation, the rule of the Second and D.C. Circuits conflicts with the decision below, for the Eleventh Circuit makes no exception for claims based on a "facially discriminatory salary structure" (BIO 9). See Pet. App. 24a. Respondent asserts otherwise, claiming that "the *Shea* plaintiff's claims would be timely under the Eleventh Circuit's opinion because he only challenged his initial wage assignment," BIO 12, a type of claim, respondent says, that is still actionable under *Calloway* v. *Partners National Health Plans*, 986 F.2d 446 (CA11 1993). BIO 12. But the panel made clear that the suit in *Calloway* was timely not because it challenged only the initial pay grade assignment, but rather because there was "no indication * * * in *Calloway* that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise." Pet. App. 26a. Given that both Forsyth and Shea were subject to such reviews, their suits plainly survived only because they were brought in the Second and D.C. Circuits rather than the Eleventh.

Other Courts. Respondent does not even attempt to distinguish the conflicting authority from other circuits identified in the petition and the court of appeals' decision. See Pet. 14-15; Pet. App. 20a & n.17 (collecting cases).[4] That these cases were decided prior to *Morgan* provides no reason to believe that they are no longer binding circuit precedent on the question presented. This Court itself recognized that *Morgan* left untouched *Bazemore*'s conclusion that each discriminatory paycheck constitutes a discrete violation of

---

[4] Nor does respondent disagree that the law in the Seventh Circuit is confused and conflicting. Pet. 13-14.

Title VII. See 536 U.S. at 112. Accordingly, when presented with the argument, both the Second and the D.C. Circuits explicitly rejected the assertion that *Morgan* undermined their pre-*Morgan* precedents applying *Bazemore*. See *Forsyth*, 409 F.3d at 572-73; *Shea*, 409 F.3d at 453-54. A recent decision from the Eighth Circuit likewise reaffirmed that court's continued reliance on *Bazemore* as establishing that "each week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation." *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671 (2006). Compare *Ashley*, 66 F.3d at 167-68 (reaching the same holding pre-*Morgan*).[5] There is, accordingly, no reason to believe that the passage of time will lead all of these courts adopt the Eleventh Circuit's view.

EEOC. Respondent also makes no attempt to conceal the open conflict between the Eleventh Circuit's decision and the EEOC's interpretation of the Title VII limitations period as expressed in its Compliance Manual, its brief in this case, and prior administrative rulings. See EEOC COMPLIANCE MANUAL § 2-IV.C; EEOC Br. 1;[6] *Albritton* v. *Postmaster General*, No. 01A44063, 2004 WL 2983682, at *2 (EEOC Office of Fed. Op., Dec. 17, 2004). This disagreement has significant practical consequences given the EEOC's adjudicative authority over Title VII claims by federal employees. A federal employee may appeal an agency's denial of a disparate pay claim to the EEOC, whose decision is binding upon the agency. See 29 C.F.R. 1614.401, 1614.502. In such proceedings, the EEOC has recognized

---

[5] The District of Columbia Court of Appeals likewise recently "reconciled the Supreme Court's decisions in *Bazemore* and *Morgan*" by holding that "an employee may recover for discriminatorily low pay received within the limitations period because each paycheck constitutes a discrete discriminatory act." *Zuurbier* v. *Medstar Health, Inc.*, 895 A.2d 905, 913 n.13 (2005).

[6] Because the EEOC was simply an amicus below, it is not a party to this petition and, accordingly, the Solicitor General has not had occasion to express his view on the merits of this petition.

employees' right to challenge discriminatory pay checks issued during the Title VII limitations period, even if they implement decisions made outside that period. See, *e.g.*, *Amft* v. *Mineta*, No. 07A40116, 2006 WL 985183, at *5 (EEOC Office of Fed. Opp., Apr. 6, 2006); *Albritton*, *supra*. Accordingly, petitioner's claim would have been actionable if she had been a federal employee, but was foreclosed because she worked for Goodyear instead. That disparate treatment of similarly situated workers within the Eleventh Circuit is untenable and requires this Court's correction.

3. Respondent's assertion (BIO 19-22) that this case is a poor vehicle to decide the question presented is based on nothing more than an attempt to rehash the factual assertions rejected by both the jury and the district court (which found the jury's verdict "abundantly supported by the evidence," Pet. App. 12a.). As respondent acknowledges (BIO 20), the court of appeals did not pass on Goodyear's assertion that there was insufficient evidence to show that petitioner was denied raises prior to 1997 on the basis of sex. Respondent would, of course, be free to press that claim again upon remand if this Court reversed the Eleventh Circuit's statute of limitations holding. But this Court should not forgo this opportunity to resolve an important circuit conflict on a statute of limitations question simply because the defendant might eventually prevail upon the merits on remand.

In any event, the jury's verdict was well-founded. The evidence showed that by the time of her retirement, petitioner's annual salary during was as much as $20,688 less than her male peers in the same job and department in 1998. Def. Exh. 2, 3, 6, 48. Petitioner earned substantially less than the lowest paid male in the same job and department, even less than men whose performance was ranked the same or lower than hers. Tr. vol. II 257, 280; vol. III 358-59; Def. Exh. 48, 2, 3, 6. Moreover, unlike the men in her job, petitioner's pay often fell below even the minimum salary established by Goodyear's written policies. Tr. vol. II, 339, 360 ("[i]f you look at Lilly's present salary * * * at that time,

it was really below minimum"). And the jury was aware that the other two female Area Managers were also paid less than their male counterparts. See Pet. 3.

It is true that respondent proffered a non-discriminatory explanation for the disparity, including excuses for why it repeatedly passed over petitioner, but not similarly situated male supervisors, for raises. But the jury was not required to accept that story. The jury was entitled, for example, to take into account petitioner's direct evidence of discriminatory intent, including the plant manager's statement that "the plant did not need women," Tr. vol. I, 29, evidence to which respondent did not object, and that the court of appeals did not find inadmissible.[7] Having heard all the evidence, including the particular setting and context of petitioner's employment environment, it fell to the jury to decide the credibility of respondent's witnesses and their explanations. See *Ash* v. *Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006). That conclusion is entitled to a strong presumption of validity which respondent has not overcome. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) ("[A] prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability.").

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

---

[7] Respondent falsely claims that the court concluded this testimony was "hearsay upon hearsay." BIO 21. But the court was plainly referring to *other* testimony, regarding statements by supervisor Jerry Jones, not plant manager Richard O'Dell. See Pet. App. 35a n.27. And while the court thought the evidence insufficient to show that O'Dell was responsible for petitioner's proposed layoff in 1997, it reached no such conclusion regarding O'Dell's participation in the prior salary decisions. See *id.* 36a.

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert L. Wiggins, Jr.
Jon C. Goldfarb
WIGGINS, CHILDS, QUINN
& PANTAZIS
The Kress Building
301 Nineteenth St. North
Birmingham, AL 35203

Kevin K. Russell
(Counsel of Record)
Amy Howe
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

June 5, 2006